No. 84-1179

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED TRANSPORTATION UNION, SUCCESSOR TO BROTHERHOOD OF RAILROAD TRAINMEN, a labor organization,
Petitioner,

vs.

JOE VERNON SEARS, an individual, in person and for all other persons similarly situated, ALBERT L. BENNETT, C. J. SKELTON, ARCHIE N. JONES, FOREST D. TOLLETT, JOHN W. LANDRUM, LAWSON C. SPENCER, THOMAS H. WHITE, EARLIE NASH, AUBREY A. ROBINSON, EDWARD RAWLINS, JOHN W. COLE, CHARLES MAJORS, JR., JESSE J. SMITH, PAUL H. STEWART, JIMMY E. BROWN, CARL E. CHESTER, RAY E. LANDRUM, RAYMOND WILLEY, ELGIE CROW and ELLIS JOHNSON, CRISCEL KEMP, A. M. BENNETT, A. L. WOOLFOLK, T. C. LUCKEY, W. W. SEYMOUR, THE BROTHERHOOD OF SLEEPING CAR PORTERS, and THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM SITZER
KEITH C. ZAGAR
DUBAIL, JUDGE, KILKER,
O'LEARY & SMITH
One Mercantile Center, Suite 3210
St. Louis, Missouri 63101
(314) 241-4261

and

ROBERT L. HART
General Counsel, United
Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107
(216) 228-9400
Attorneys for Petitioner

January 18, 1985

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether a railroad craft labor union, which maintained and enforced historic jurisdictional and seniority rights under its collective bargaining obligations to its craft members, can be liable for back pay to non-craft employees under Title VII of the Civil Rights Act, 42 U.S.C. §2000e-5(g), for the failure to hire or promote the non-craft employees to positions in the craft, where the employer had and exercised sole authority to hire and promote all employees.

2. Whether the railroad craft seniority system here involved, which is almost 100 years old, which has existed since the early days of railroading in the United States, and which existed prior to the formation of the non-craft employees, is "bona fide" and exempt under Title VII of the Civil Rights Act, 42 U.S.C. §2000e-2(h).

3. Whether a sum of money (called a tax component) can be included as a part of a back pay award under Title VII, 42 U.S.C. §2000e-5(g), to compensate the members of the class for their additional tax liability as a result of receiving several years of back pay in a lump sum in a single year.

4. Whether a district court, having found a railroad and a railroad craft labor union liable to a class of employees under Title VII, 42 U.S.C. §2000e-2, must determine the degree of fault and responsibility of the union for the unlawful employment practices, and apportion the damages between the union and the employer according to their relative degrees of fault under 42 U.S.C. §2000e-5(g).

LIST OF ALL PARTIES TO THE PROCEEDING

Austin, Robert William
Bennett, A. M.
Bennett, Albert L.
Brown, Jimmy Eddie
Burton, Porter
Butler, Theodore
Cheers, William Howard
Chester, Carl Everett
Christopher, William D.
Cole, John Wesley
Collins, James Jr.
Combs, Willie
Crow, Elgie
Finley, Leon Albert
Garner, Gerald B.
Garner, Robert H.
Garth, James R.
Guest, George
Harris, Hansul L.
Henry, John S. Jr.
Hestle, Guy W.
Hollowell, Robert Luther
Hunter, Obie F.
Jackson, James Paul
Jenkins, Herbert Leroy
Johnson, Ellis
Jones, Archie Newman
Kemp, Criscell
Kern, Donald Emil
Knighton, Frank C.
Knighton, Herbert C.
Landrum, John Wesley
Lewis, Clarence
Luckey, Theodore C.
Majors, Charles Allen

McGaugh, Eugene E.
Mitchell, Marion R.
Moore, Sherwood
Nash, Earlie
Papin, Bobbie Charles
Patillo, Walter
Preston, Leroy
Prince, Luther Terrance
Rawlins, Edward W.
Reynolds, Pink
Robinson, Aubrey A.
Robinson, Cecil M.
Robinson, Vernon M.
Sears, Joe Vernon
Seymour, W. W.
Shelby, John W.
Skelton, Clifford J.
Smith, Jesse John A.
Smith, Vaughan Henry
Southall, Levi E..
Spencer, Lawson Cole
Steward, William
Stewart, Paul Henry
Talbert, Samuel Marvin Jr.
Thaw, Baylon Kirkpatrick
Tollett, Forest P.
Wagner, Ray Orval
Walker, Oscar Alfred
White, Thomas Henry
White, Thomas James
Wiley, Raymond Iven
William, Cecil B.
Williams, George L.
Williams, Wilborn
Wimberly, Offie
Woolfolk, Arthur

Wright, Obie
The Brotherhood of Sleeping Car Porters
The Atchison, Topeka & Santa Fe Railway Co.
United Transportation Union, successor to the
Brotherhood of Railway Trainmen

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REFERENCE TO THE OPINIONS BELOW

Sears v. Atchison, Topeka & Santa Fe Railway Company, 454 F. Supp. 158 (D. Kan. 1978) (order concerning liability); 19 FEP Cases (BNA) 1007 (D. Kan. 1978) (order concerning seniority and formula for back pay relief), *aff'd in part rev'd in part and remanded,* 645 F. 2d 1365 (10th Cir. 1981), *cert. denied,* 456 U.S. 964 (1982); *on remand in the district court,* 30 FEP Cases (BNA) 1084 (D. Kan. 1982), *aff'd* 36 FEP Cases 785 (10th Cir. 1984).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered December 10, 1984, and this Petition for Certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42

Section 2000e-2(c)

It shall be an unlawful employment practice for a labor organization—

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 2000e-2(h)

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment

pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206 (d) of Title 29.

Section 2000e-5(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a

member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

STATEMENT OF THE CASE

This was a class action brought in 1972 by Joe Vernon Sears as a train porter employed by Defendant Atchison, Topeka & Santa Fe Railway Company (Santa Fe) against Santa Fe and United Transportation Union (UTU) charging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Joe Sears filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC) in March, 1966, against Santa Fe and UTU's predecessor. UTU is the successor by merger effective January 1, 1969, to Brotherhood of Railroad Trainmen (BRT), which represented brakemen, and Order of Railway Conductors and Brakemen (ORC & B), which represented conductors. The Brotherhood of Sleeping Car Porters (BSCP), the union representing the train porter's craft on the Santa Fe, was subsequently joined as a party-plaintiff. The suit alleged discrimination resulting from the railroad's job structure for brakemen (whites) and train porters (blacks). Later proceedings made clear that the monetary claims of back pay were solely based on charges of discrimination resulting from the failure to promote the train porters to positions as brakemen.

The case was tried entirely on the basis of stipulated facts. The action was certified as a class action under Rule 23(b)(2) Federal Rules of Civil Procedure. Plaintiff Joe Vernon Sears was named as class representative on behalf of himself and a class comprised of all black train porters who had been

employed by Santa Fe during the period beginning July 2, 1965, and who have employed at any time as a train porter. Prior to trial, Santa Fe compromised claims against it for back pay and attorney's fees and remained as a party for purposes of seniority and injunctive relief only.

The hiring and promoting of all employees has always been a retained right of Santa Fe, and all such authority was exercised exclusively by Santa Fe. UTU never had, nor exercised, any hiring or transfer authority. At no time has membership in UTU or any other labor union been a condition prior to employment for any person of any race for hire or promotion by Santa Fe into any craft.

UTU and its predecessors have represented members of the crafts of brakemen and conductors since 1868. From 1868 until 1966, Santa Fe was a "open shop" employer and membership in a union was not a condition of employment. Since 1966, Santa Fe has been a "union shop" employer and membership in a union, certified to represent the employee craft by the Railway Labor Act, 45 U.S.C. §151, et seq, is required within 30 days after employment in the craft.

UTU and its predecessors entered its first collective bargaining agreement with the Santa Fe in 1892. The agreement contains seniority provisions. The position of train porter was not created by the Santa Fe until March, 1899, seven years after the first known contract containing the seniority provisions. So far as is known, except for the Silsbee District in Southern Texas, all brakemen and conductors hired by Santa Fe until 1965 were white. So far as is known, all train porters have been black.

Train porters were used by Santa Fe only in passenger service. Brakemen had to spend years in the more dangerous freight and yard service before gaining sufficient seniority to obtain a braking job on a passenger train.

The railroad crafts here involved were denominated by the National Mediation Board, designating employees according to

traditional work functions under the Railway Labor Act. ORC & B and BRT were certified to represent the conductors and brakemen, respectively, in 1926. BSCP was certified to represent the train porters and chair car attendants in separate proceedings in April, 1946. Thereafter, each of these crafts was recognized as a separate craft under the Railway Labor Act and by the federal government in General Order 27 by the District General of Railroads.

In May, 1950, BSCP and Santa Fe executed a collective bargaining agreement for chair car attendants containing seniority provisions. No written collective bargaining agreement covering seniority provisions for train porters ever existed. The seniority system for Santa Fe train porters was established through custom and practice, recognized by the Train Service Board and National Railway Adjustment Board. The last train porter was hired by Santa Fe in 1956, nine years before the effective date of Title VII.

Seniority in any craft was not transferable from one seniority district to another, nor transferable from one craft to another. However, a train porter continued to accumulate seniority on a chair car attendant's roster after he began working as a train porter in addition to his train porter's seniority. The seniority system for brakemen and conductors was established under collective bargaining contracts negotiated separately by BRT and ORC & B with the Santa Fe. At all times the seniority date in either craft began when a person first worked in or was promoted to that craft.

In its findings of fact, the district court found that the certified bargaining representatives of brakemen had acted throughout the history of the railroad to ensure that braking duties were performed by its members. The court also found that in 1883, at the time of the first constitution of BRT, there was no "whites only" clause. The first "whites only" clause appeared by the 1939 constitution, well after the crafts had been established; it was removed by the BRT in 1960, five years before the effective date of Title VII.

Beginning not later than 1920, a dispute developed between the brakemen and the train porters concerning braking duties on Santa Fe trains. The BRT was ultimately successful. In Award 19324 issued October 14, 1959, the National Railroad Adjustment Board held that only those train porters holding a seniority date prior to April 20, 1942, could perform braking duties. All train porters with a seniority date subsequent to April 20, 1942, were demoted to chair car attendants and could no longer work as train porters. During the dispute, in 1932, the general chairman for the BRT, H.W. Cross, sent a series of letters to the Santa Fe proposing negotiations for the consolidation of the seniority of brakemen and train porters on all divisions of Santa Fe's eastern and western lines. Santa Fe responded that it would not negotiate such a consolidation because the BRT had not represented the train porters.

On February 7, 1965, certain unions (not including either UTU or BSCP) entered into an agreement with the railroads, including Santa Fe, providing protection to the employees covered therein (February 7 agreement). The protection included guaranteed income but prohibited the carriers from transferring covered employees into other employment. In 1966, BSCP and Santa Fe extended this agreement to include train porters and chair car attendants. UTU was not a party to this agreement; BSCP took steps to ensure that Santa Fe followed the agreement.

With railroad passenger traffic declining, some chair car attendants applied to Santa Fe for employment in other crafts, including brakemen positions. They offered to surrender their February 7 protection and former seniority to accept this opportunity. BSCP formally objected but subsequent negotiations resulted in an agreement in 1971 between Santa Fe and BSCP permitting Santa Fe to assign train porters to positions as brakemen, retaining previously accumulated seniority as chair car attendants (prior to 1971, most individuals did not request brakemen's jobs because they were not willing to give up their

chair car attendant seniority in order to accept these positions from Santa Fe). A number of individuals availed themselves of the 1971 agreement. The February 7 (1965) agreement requiring these individuals to give up their chair car attendant seniority in order to accept positions as brakemen was negotiated between BSCP and the Santa Fe in 1966. UTU had nothing to do with this agreement, and was powerless to intercede on behalf of the train porters.

The district court found that the seniority system was neutral on its face and applied equally to all brakemen. It further found that the structure of the separate crafts was rational and in accordance with industry practice, being consistent with Railway Labor Act precedent. It found that the crafts had been recognized by the federal government and its agencies and that the separate crafts had separate certified bargaining representatives under the Railway Labor Act. The district court further found that the crafts had been denominated as separate crafts by the National Mediation Board under the Railway Labor Act and were recognized by the United States Government by Supplement No. 12 to General Order 27 in 1918. It found that the separate crafts were in accordance with industry practice and that the craft structure on the Santa Fe had existed in substantially the same form since the late 1800's and had existed on other railway lines in the United States in the same form. It found that UTU had no liability for post-act discriminatory conduct, for it neither had, nor exercised any hiring and transfer authority and therefore did not engage in any employment conduct which affected the Plaintiffs or class members. It found that UTU had no back pay liability to any train porter demoted by the National Railroad Adjustment Board.

REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Tenth Circuit has decided the question of the liability for back pay of a labor union in a Title VII case in conflict with applicable decisions of this Court; it has decided an important federal question on the liability of a labor union for back pay under Title VII which has not been, but should be, settled by this Court.

a. The decision of the United States Court of Appeals for the Tenth Circuit is contrary to this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982) and raises an important federal question on the liability of a labor union for back pay under the "responsibility" standard of 42 U.S.C. §2000e-5(g).

This Court held in *Ford Motor* that an employer can toll the accrual of back pay liability under Title VII by unconditionally offering the claimant the job previously denied without offering seniority retroactive to the date of the alleged discrimination. The stipulated evidence in this case was that UTU was without power or authority to hire or promote the train porters to positions as brakemen. Back pay was awarded against UTU strictly on a formula of the difference between a train porter's earnings and a brakemen's earnings. UTU was found liable for back pay relief for failure to promote persons when it had no power or authority to cause the promotions to occur.

This Court should consider whether a labor union should be liable for back pay for discriminatory failure to promote when the labor union does not have the ability or authority to cure the discrimination (toll the accrual of back pay). The stipulated evidence makes clear in this case that UTU had no such ability or authority.

Ford Motor makes clear that back pay is not an automatic and mandatory remedy, but rather one which the courts should invoke in their discretion as a matter of equity. Back pay should not be awarded mechanically. 458 U.S. at 226. To avoid a

mechanical application of back pay as a remedy, an analysis should be made on the principle of legal causation. Back pay should be awarded under *Ford Motor* on the principle that the "wrongdoer" has the ability to right the wrong and fails to do so.

This Court should determine standards based upon legal causation when back pay should be awarded against a labor union. Here, the individuals involved claimed discrimination based upon a failure to promote them from positions as train porters to positions as brakemen. UTU had no power to make the promotions. 42 U.S.C. §2000e-5(g) provides that back pay may be awarded against a labor organization, but only where the labor organization is responsible for the unlawful employment practice. In this case, Santa Fe was, by stipulated facts, responsible for the failures to promote. Since UTU had no authority or power to cause the promotions to occur, the remedy of back pay was applied mechanically rather than on the basis of legal causation. Where there is a violation of Title VII, but an insufficient nexus between the union's behavior and the injuries suffered by the class, the court should grant injunctive relief and necessary affirmative action to correct the effects of the employment practices but should not award back pay against the union. *Patterson v. Youngstown Sheet and Tube Co.*, 659 F.2d 736 (7th Cir.), *cert. denied,* 454 U.S. 1100 (1981). UTU simply had no power to "cause or attempt to cause" Santa Fe to commit or refrain from these discriminatory promotion practices under 42 U.S.C. §2000e-2(c)(3). For the foregoing reasons, the decision of the Court of Appeals for the Tenth Circuit is in conflict with this Court's decision in *Ford Motor,* and because this Court has not ruled on the application of these principles to a labor union, an important federal question arises in this case which has not been, but should be, settled by this Court.

b. The Tenth Circuit has decided a federal question in conflict with this Court's decision in *General Building Contractors Association v. Pennsylvania,* 458 U.S. 375 (1982).

This Court holds in *General Building Contractors* that under 42 U.S.C. §1981, each co-defendant's liability must be determined based upon that defendant's responsibilities. There can be no vicarious liability by one defendant based upon another defendant's acts, especially on the issue of intent. In the context of this case, the rule means that the legal responsiblity of UTU is determined by its own duties, responsibilities and powers. The analysis of UTU's liability by the courts below in this case was based upon an intent to discriminate established with respect to Santa Fe but not with respect to UTU. The activities of Santa Fe have been attributed to UTU.

At issue is the very existence of our national labor policy and the relationship between an employer and the unions that represent its employees. In *General Building Contractors,* the district court erroneously found an employer liable for discrimination caused primarily by a union because the employer retained the power to oppose union discrimination. This Court held that the power to oppose the union is not tantamount to a right to control the union.

The Tenth Circuit in its 1981 opinion finds that UTU acquiesced to the discriminatory practices (failure to promote the train porters) of Santa Fe and is therefore liable. 645 F.2d at 1375. The issue, then, is the duty, if any, imposed on UTU by the statute to oppose discriminatory failure to promote members of the class to positions as brakemen. The power to oppose is not equivalent to a power to control the promotion practices of management of Santa Fe.

This Court holds in *General Building Contractors* that when a duty is imposed by the civil rights laws to refrain from intentionally discriminating, it does not make all unions and employers "guarantors of the workers' rights as against third parties who would infringe them." 458 U.S. at 396. The Tenth Circuit automatically assumed that it was within the power of the union to prevent the employer from discriminating, contrary to *General Building Contractors.* The Tenth Circuit's opinion

that UTU indirectly encouraged discrimination by Santa Fe is a finding of vicarious liability on UTU. The fact that management of Santa Fe retained the sole right to hire and promote made such duties "non-delegable" to UTU. UTU had no power (therefore no duty) to control the promotion practices involved.

c. The Tenth Circuit's decision is in conflict with *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), because there was no showing of discriminatory intent by UTU and because the Tenth Circuit did not follow the proper standard of appellate review.

Under the civil rights statutes, a plaintiff can establish a prima facie Title VII violation upon a showing of policies or practices that are neutral on their face and in intent but that nevertheless discriminate in effect. However, the statute's treatment of seniority systems establishes an exception to these general principles. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 349 (1977). The so-called seniority exception is found at 42 U.S.C. §2000e-2(h). This Court's decision in *Swint* holds that under the seniority exception a showing of disparate impact is insufficient to invalidate a seniority system, even though the result may be to perpetuate pre-Act discrimination. This Court states:

> Thus, any challenge to a seniority system under Title VII will require a trial on the issue of discriminatory intent: Was the system adopted *because* of its racially discriminatory impact? (emphasis added) 456 U.S. at 277.

The courts below do not reach that primary question, although they do consider factors which this Court reaffirmed in *Swint*.

The Tenth Circuit, in its 1981 opinion, finds that it is unnecessary to find that the union (UTU) entered the agreement with the intention of discriminating. 645 F.2d at 1375. This Court makes clear in *Swint* that acquiescence to the

discriminatory conduct of another party is not the equivalent of discriminatory purpose. This Court states, 456 U.S. at 289-290:

> Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive.

Acquiescence is not enough, and the Tenth Circuit's prior ruling that it is unnecessary to find that UTU entered the collective bargaining agreement with the intention of discriminating is directly contrary to this Court's decision in *Swint*.

Swint also holds that an intent to discriminate on account of race is a pure question of fact, subject to the "clearly erroneous" standard of Federal Rule 52(a). It is not a mixed question of law and fact. 456 U.S. at 287-288. Where, as here, the issue is the seniority exception to the Civil Rights Act, the findings of fact of a district court may not be set aside unless clearly erroneous.

The Tenth Circuit sets aside factual findings of the district court without finding them to be clearly erroneous. Disregarded are the findings of the district court on the rational structure of the separate crafts of porters and brakemen, recognized by the National Mediation Board, with the Tenth Circuit making its own findings that the crafts were irrational by being drawn along racial lines. The district court's findings on other factors are disregarded by the Tenth Circuit by changing the analysis or by choosing particular facts other than those chosen by the district court. The Tenth Circuit ignores the evidence and the findings of the district court which clearly establish that the chair car attendants and their subclass had a status not as the result of negotiations from collective bargaining but rather as a result of rulings of the National Railroad Adjustment Board. The Tenth Circuit reverses the district court and awards back pay to this subclass without setting aside any findings as clearly erroneous, and substitutes its own findings.

The Tenth Circuit disregards the finding of the district court that from 1868 until 1966 Santa Fe was an open shop employer and that membership in a labor union was not a condition of employment. It disregards the fact that the promoting of employees is a retained right of management of the Santa Fe. It disregards the finding of the district court that the bargaining representatives of the brakemen were acting to ensure that braking duties were performed by their members. These findings of the district court were not found by the Tenth Circuit to be clearly erroneous, and they should not have been set aside. This Court has specifically prohibited the courts of appeals from imposing liability on Title VII defendants in this manner. 456 U.S. at 291.

d. The Tenth Circuit's decision is directly contrary to this Court's decision in *American Tobacco Company v. Patterson*, 456 U.S. 63 (1982).

The so-called seniority exception to the Civil Rights Act, 42 U.S.C. §2000e-2(h) has been construed by this Court in *American Tobacco* to establish that a seniority system that has a discriminatory impact is not sufficient alone to invalidate the system; actual intent to discriminate must be proved. This Court states that the legislative history of the Civil Rights Act reveals that Congress did not intend seniority systems to be lightly set aside, and promulgated this section to immunize seniority systems unless very specific findings of intent to discriminate are made. This Court states:

> Seniority provisions are of 'overriding importance' in collective bargaining...and 'are universally included in these contracts'...The collective-bargaining process 'lies at the core of our national labor policy...' Congress was well aware in 1964 that the overall purpose of Title VII, to eliminate discrimination in employment, inevitably would, on occasion, conflict with the policy favoring minimal supervision by courts and other governmental agencies

> over the substantive terms of collective bargaining agreements. . .Section 703(h) represents the balance Congress struck between the two policies, and it is not this Court's function to upset that balance. 456 U.S. at 76-77.

The court below in this case set aside and invalidated a railroad craft seniority system almost 100 years old, which has existed since the early days of railroading in the United States, and which existed prior to the formation of the train porter craft. Although there was established an unfortunate discriminatory impact on the train porters, the Tenth Circuit's decision is contrary to *American Tobacco* because there was no factual showing that UTU intended to discriminate. The Tenth Circuit states that it is unnecessary to find that the union entered the agreement with the intention of discriminating. 645 F.2d at 1375. This analysis ignores the lack of legal causation between the union's actions and the alleged discriminatory effects of hiring and promoting. Appropriate is *Franks v. Bowman Transportation Company,* 424 U.S. 747, 758 (1976), where this Court states:

> The underlying legal wrong affecting them is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system.

A racially discriminatory hiring system could not expose UTU to liability where it concededly had nothing to do with hiring. As the Fourth Circuit has stated in *Lewis v. Tobacco Workers' International Union,* 557 F.2d 1135, 1144-1145 (4th Cir. 1978), where a union has nothing to do with hiring, it should be dismissed from a complaint charging discrimination in hiring practices. This Court should review these important seniority system questions in the context of labor union liability in the Title VII scheme.

2. The decision below raises significant and recurring questions concerning the liability of a Title VII defendant for an additional sum of back pay called a tax component to compensate the class for tax disadvantages in receiving several years of back pay in a lump sum in a single year.

a. The Tenth Circuit's decision to award a tax component is directly contrary to this Court's decision in *Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982) because it would impair the conciliation process.

In *Ford Motor Company v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982), this Court made clear that in determining a back pay award, the legislative history of Title VII requires a determination of the effect of the award on the conciliation process. The Court stated that the "large objectives" of Title VII require that uncertainty not be introduced into the conciliation process because the primary purpose of Title VII is conciliation at the administrative level. To inject into this process the tax effects of each worker, which would include reference to such factors as income from other sources, marital status, family size, itemized deductions and tax credits for each individual, would also present serious administrative problems and impair the conciliation process by increasing the number of claimants wanting an additional award for their supposed tax disadvantages. Decreasing the effectiveness of the conciliation process would result in substantial increases in litigation as claimants contest either their right to a premium for income taxes or the method used in calculating their back taxes. The decision below would constitute a vast expansion of Title VII damages with tremendous harm to the conciliatory process, without any Congressional authorization whatsoever.

b. The Tenth Circuit's decision is directly contrary to decisions of other circuits barring the award of compensatory damages in a Title VII case.

Albermarle Paper Company v. Moody, 422 U.S. 405 (1975) and its progeny have clearly established the various elements comprising a back pay award (salary and fringe benefits) under the "make whole" provisions of Title VII, and a tax component has never been included. In this regard, then, the decision below is in conflict with all Title VII decisions by offending the generally understood use of the term "pay" in *Albermarle* as compensation or wage received from an employer by an employee and in awarding compensatory damages, which until now were not recoverable under Title VII. *DeGrace v. Rumsfeld,* 614 F.2d 796 (1st Cir. 1980); *Harrington v. Vandalia-Butler Board of Education,* 585 F.2d 192 (6th Cir. 1978), *cert. denied,* 441 U.S. 932 (1979). Any tax disadvantage the class members may sustain under the laws, rulings, and regulations in force at the time payment of back pay is made to them is not recoverable because it represents compensatory damages and is not a benefit paid by employers to employees as compensation for services, the only items of damages permitted in a back pay award.

Therefore, because of the serious conflict the decision below has with *Albermarle,* concerning the elements of a back pay award, and with decisions of other circuits that compensatory damages are not recoverable, the likelihood that the decision will result in a substantial increase in litigation concerning the tax aspects of a back pay award and because the case will substantially impair the conciliatory process, which *Ford Motor* prohibits, this court should grant this petition for writ of certiorari to review these important federal questions.

3. The decision below raises significant and recurring questions concerning the liability of a labor union under Title VII of the Civil Rights Act, 42 U.S.C. §2000e-2, when the district court, after finding Title VII liability on the part of the labor union and the railroad employer, fails to determine their relative degree of fault and to apportion damages in accordance with 42 U.S.C. §2000e-5(g).

a. The Tenth Circuit's decision is directly contrary to decisions of this Court and of other circuits which require the district court to apportion liability between the union and the employer.

Although requested to do so by UTU, the district court refused to determine the relative degree of fault of UTU and Santa Fe in causing the discrimination suffered by the Plaintiff class members. The refusal to do so is a direct conflict with decisions of other circuits which require the district court to apportion Title VII liability between the union and the railroad. *Patterson v. Youngstown Sheet and Tube Company,* 659 F.2d 736 (7th Cir.), *cert. denied,* 454 U.S. 1100 (1981); *Parson v. Kaiser Aluminum and Chemical Corporation,* 583 F.2d 132, 134 (5th Cir. 1978, *cert. denied,* 441 U.S. 968 (1979); *Myers v. Gilman Paper Corporation,* 544 F.2d 837, 851-852 (5th Cir.) *cert. dismissed,* 434 U.S. 801 (1977); *United States v. United States Steel Corporation,* 520 F.2d 1043 (5th Cir. 1975), *cert. denied,* 429 U.S. 817 (1976); *Johnson v. Goodyear Tire & Rubber Company,* 491 F.2d 1364, 1382 (5th Cir. 1974). The district court should have considered the relative responsibilities of union and employer for back pay caused by the loss of brakeman's wages by the train porters. Santa Fe was found to have violated provisions of Title VII, along with UTU, however, the district court refused to decide the apportionment issue. The duty to apportion damages is clearly set forth in 42 U.S.C. §2000e-5(g) which provides in pertinent part:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate...with or without back pay (payable by the employer...or labor organization, as the case may be, *responsible for the unlawful employment practice*)...(emphasis added).

In its order, the court of appeals held that apportionment was not necessary because the wrong committed by UTU "was a

separate wrong from that of the employer [Santa Fe], defined by separate subsections of the Statute." However, because there were two "wrongs" is the very reason why a hearing must be held to determine how much damage was caused by UTU. In *Vaca v. Sipes,* 386 U.S. 171 (1967), plaintiff brought suit against his former employer for breach of a collective bargaining agreement and against his union for breach of its duty of fair representation in the handling of plaintiff's grievance. This Court held:

> The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the Union had breached its duty, all or most all of [the employee's] damages would still be attributable to his allegedly wrongful discharge by [the employer]. For these reasons, even if the Union here had properly been found liable for a breach of duty, it is clear that the damage award was improper.

386 U.S. at 197-198. The rule in *Vaca* was followed as recently as 1983 in *Bowen v. United States Postal Service,* 459 U.S. 212 (1983), in which the Court held that the employee's damages must be apportioned between the employer which breached the collective bargaining agreement and the union which refused to process the grievance. Fairness demands that Title VII parties be liable only for the damages they caused.

b. The decision of the Tenth Circuit raises an important federal question on the effect of a settlement by one party defendant on the liability of a nonsettling defendant in a Title VII case.

UTU is not suggesting that following an apportionment of the fault of the parties that Santa Fe would be liable for any additional amount of back pay if what Santa Fe paid pursuant to its settlement agreement with the class was determined to be less than its relative degree of fault or the damages which it caused, rather, that the fault and responsibility of UTU and Santa Fe must each be determined.

The duty of the district court to determine the relative fault of the parties and to apportion damages persists irrespective of the settlement reached between Santa Fe and the class. Santa Fe remained a party to the lawsuit after settling its back pay liability and was found to have violated Title VII by discriminating against the class members. Following the settlement, the district court determined the total back pay damages of the class members (approximately $5,960,000), then deducted from this amount the proceeds received by the class from its settlement with Santa Fe (approximately $130,000) and found UTU responsible for the balance, without determining the relative fault of UTU and Santa Fe and without making any determination from the evidence of the amount of damages each defendant caused, although each was found to have violated Title VII.

This application of *pro tanto* reduction by the district court is harsh and unjust and directly contrary to the district court's obligation to apportion liability for back pay according to the responsibility of the union and the employer. It results in a determination of liability on a nonsettling party bearing no reasonable relationship to the actual degree of fault of the parties or the damages which each caused. The district court, sitting as a court of equity, did not do equity, but simply applied a mechanical formula.

A system in which a settlement by one Title VII defendant effects a dollor-for-dollar reduction in the discriminated employee's recovery against other, nonsettling defendants would deprive the plaintiffs of a favorable settlement agreement when the settling party contributes what turns out to be more

than its proportionate share of the fault, or the damages it caused. In such a case, the nonsettling party would enjoy the benefit of plaintiff's bargain. No principle of Title VII or equity requires that the nonsettling party be awarded this benefit and not be called upon to compensate the discriminated employees for the harm it caused. In summary, a *pro tanto* reduction by its nature is dependent upon the terms of the settlement agreement, to which the nonsettling defendant was not a party nor bound, to affix the liability of the nonsettling party. The share of the nonsettling defendant, UTU in the present case, is based solely on the terms of a collateral settlement agreement and not with regard to the relative degree of fault of UTU and Santa Fe or with regard to what damages were caused by each party.

A settlement contract in Title VII must operate to satisfy that portion of the back pay award that corresponds to the degree of fault of the settling party. This rule would provide incentive for plaintiffs to settle with all parties and permit the remaining Title VII defendant to negotiate a settlement on the same footing as the first defendant to settle. The rule would not impose on the nonsettling defendants any of the settling defendant's share of the loss and would not let the plaintiffs' advantageous settlement agreement with one defendant become a windfall to the remaining defendants. Adoption of these principles would carry through to Title VII the Court's direction in *Vaca v. Sipes* that responsibility for damages be based on the fault of the parties, would provide a framework for determining the effects of a settlement which could in fairness be applied in all situations and recognizes the freedom to contract for settlements between employees and those responsible in whole or in part for their damages. The freedom to contract includes the freedom to make a bad bargain.

The court of appeals stated that the precise issue in this case has never been decided by the Supreme Court, but believed *Northwest Airlines, Inc. v. Transport Workers' Union*, 451 U.S. 77 (1981), to be similar. In *Northwest Airlines*, a female cabin at-

tendant, on behalf of herself and others similarly situated, brought an action against her employer for violations of the Equal Pay Act and Title VII. After entry of judgment against it, the airline commenced a separate action against several unions representing the cabin attendants for contribution. 451 U.S. at 81-82. This Court held that the complaint should be dismissed because there is no implied statutory right or federal common law right to contribution and it would not create one under either the Equal Pay Act or Title VII. 451 U.S. at 95, 98. In *Northwest Airlines,* the unions were not co-defendants with the employer in the underlying Title VII proceeding. The question faced by the Court was whether an *independent* cause of action for *contribution* exists under Title VII by a party found to have violated its provisions against one not a party. The UTU's claim concerning the apportionment of damages is based upon the relative degree of fault of two parties who were co-defendants in the lawsuit and who were both found to have violated Title VII. Nor is the rule that damages must be apportioned between the employer and union a new remedy, but rather is an equitable right which courts have recognized in the Title VII scheme. *Albermarle Paper Company v. Moody,* 422 U.S. 405 (1975).

Because the decision below is in direct conflict with decisions of other courts of appeals and with this Court's decisions in *Vaca v. Sipes* and *Bowen v. United States Postal Service,* this Court should grant this petition for writ of certiorari to review these important federal questions. The questions presented have arisen in other cases and certainly can be expected to arise in the future. A clear expression by this Court on the question will settle this case and all Title VII lawsuits commonly involving the situation when one of several parties found to have violated Title VII settles its responsibility for back pay with the discriminated employees. A decision by this Court will have a wide impact in the area of civil rights litigation. There are no peculiar facts presented in this case but rather the undisputed facts are representative of many others pending and likely to be presented in the future.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

William Sitzer
Keith C. Zagar
Dubail, Judge, Kilker,
O'Leary & Smith
One Mercantile Center, Suite 3210
St. Louis, Missouri 63101
(314) 241-4261

Robert L. Hart
General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, Ohio 44107
(216) 228-9400

Attorneys for Petitioner

January 18, 1985